

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**CYNTHIA A. BURKHART**

Claimant

VS.

**CONAGRA FOODS, INC.**

Respondent

Self-Insured

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Docket Nos. 259,007;  
270,007

**ORDER**

Claimant appealed the March 5, 2004 Award Post Award Medical and Review and Modification (Award) entered by Administrative Law Judge (ALJ) Bryce D. Benedict. The Appeals Board (Board) heard oral argument on August 31, 2004.

**APPEARANCES**

Jeff K. Cooper of Topeka, Kansas, appeared for claimant. Mark E. Kolich of Lenexa, Kansas, appeared for respondent.

**RECORD AND STIPULATIONS**

The record considered by the Board and the parties' stipulations are listed in the March 5, 2004 Award and also the March 6, 2003 Award in Docket No. 270,007 and the March 28, 2003 Award in Docket No. 259,007.

**ISSUES**

In the March 5, 2004 Award, the ALJ addressed claimant's request to review and modify the initial awards of permanent disability benefits entered in these claims and claimant's request for additional medical treatment.

In the initial Award entered in Docket No. 259,007, the ALJ determined the appropriate date of accident was December 28, 1999, and also determined claimant had sustained a 12.5 percent whole body functional impairment due to her upper extremity injuries. In analyzing claimant's permanent disability in Docket No. 270,007 for a January 24, 2001 accident the ALJ found claimant had a five (5) percent functional impairment from

her back injury. Claimant was given permanent restrictions but because she had returned to work for respondent in an accommodated job earning at least 90 percent of her pre-injury average weekly wage, her permanent partial disability awards in both docketed claims were limited to her percentages of functional impairment.

Claimant filed an application to review and modify the initial awards on the basis that she was working fewer hours and, therefore, her post-injury wage had decreased and thus her permanent partial general disability had increased. Claimant also filed a request for additional medical benefits. Later, claimant was terminated by respondent and her actual wage loss was even greater.

In the March 5, 2004 Award, Judge Benedict found claimant's actual post-injury wage had decreased but the ALJ denied modification of the initial awards because the ALJ found that before her termination claimant failed to ask to work the additional hours of work that were available. If she had worked those additional hours she would not have had a wage loss. The ALJ further found that claimant was terminated for cause from a job she had the ability to perform. As such, she failed to make a good faith effort to retain appropriate employment. And following her termination claimant failed to make a good faith effort to find appropriate employment. The ALJ also determined claimant had failed to prove a need for additional medical treatment.

Claimant contends Judge Benedict erred. First, claimant argues she was restricted from working overtime post-injury and actually worked less than 40 hours per week. As a result her actual post-injury average weekly wages while working for respondent were less than 90 percent of her preinjury average weekly wage and therefore she is entitled to a work disability award in excess of her percentage of functional impairment. Second, claimant argues she made a good faith effort to retain her job with respondent and, therefore, claimant contends she has a 100 percent wage loss commencing July 24, 2003, when respondent terminated her. She also argues she made a good faith job search following her termination. In the alternative, claimant acknowledges she retains the ability to earn minimum wage or \$206 per week and if a wage is imputed then this is the amount that should be imputed as it represents her post-accident wage earning capacity. Claimant contends her task loss is 65 percent due to her injuries to her bilateral upper extremities and 70 percent due to her low back injury, as testified to by Dr. Delgado. Third, claimant argues the respondent failed to provide needed medical treatment and therefore, the ALJ erred by denying her request for future medical treatment and specifically not authorizing her to see Dr. Steve Peloquin on an ongoing basis for pain management, including prescriptions.

In short, claimant requests this Board to modify the initial functional awards to work disability awards either from the time her wages, while working for respondent, fell below 90 percent of her preinjury average weekly wage or beginning with the claimant's July 24, 2003 termination. And claimant requests the Board to grant her ongoing medical treatment benefits.

Conversely, respondent asks that Judge Benedict's award be affirmed in all respects. Respondent contends claimant's new post-injury wage should be based upon a 40-hour workweek. Respondent argues claimant's post injury average weekly wage is \$418 (\$10.45 per hour x 40 hours per week) and that this wage should be imputed following her termination. Respondent argues claimant's termination does not reduce her post-injury wage as claimant was terminated due to her willful acts and, therefore, the wage that she was capable of earning with respondent at the time of her termination should be imputed for purposes of the permanent partial general disability formula. Accordingly, respondent argues the initial awards should not be modified to a work disability. And respondent contends that claimant is not in need of any additional medical treatment.

The issues before the Board on this appeal are:

1. What is claimant's post-injury average weekly wage for purposes of the permanent partial general disability formula for the period that she was employed by respondent?
2. What is claimant's post-injury average weekly wage for purposes of the permanent partial general disability formula commencing July 24, 2003, which is the date respondent terminated claimant?
3. Should the initial award be modified and, if so, what is the effective date of the modification?
4. Should claimant be allowed to receive additional authorized medical treatment?

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

The ALJ found claimant was not entitled to a modification of her permanent partial general disability awards in either docketed claim and further found she was not in need of additional treatment for her work-related injuries. The Board finds that the ALJ's Award should be affirmed. The Board agrees with the analysis of the evidence and law as set forth in the Award and adopts the ALJ's findings, conclusions and orders as its own.

Because claimant injured her bilateral upper extremities and her back, which is not addressed by the scheduled injury statute,<sup>1</sup> claimant's permanent disability benefits are governed by K.S.A. 44-510e, which provides, in part:

Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not

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<sup>1</sup>K.S.A. 44-510d.

covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of permanent Impairment, if the impairment is contained therein. **An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.** (Emphasis added.)

But that statute must be read in light of *Foulk*<sup>2</sup> and *Copeland*.<sup>3</sup> In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing to perform an accommodated job, which the employer had offered. And in *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wage should be imputed based upon the ability to earn wages when the worker failed to make a good faith effort to find appropriate employment.

If a finding is made that a good faith effort has not been made, the factfinder [sic] will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages . . . .<sup>4</sup>

The Kansas Court of Appeals in *Watson*<sup>5</sup> held that the failure to make a good faith effort to find appropriate employment does not automatically limit the permanent partial general disability to the functional impairment rating. Instead, the Court reiterated that an imputed post-injury wage should be based upon all the evidence, including expert testimony concerning the worker's retained capacity to earn wages.

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<sup>2</sup>*Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P. 2d 140 (1994), rev. denied 257 Kan. 1091 (1995).

<sup>3</sup>*Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

<sup>4</sup>*Id.* at 320.

<sup>5</sup>*Watson v. Johnson Controls, Inc.*, 29 Kan. App. 2d 1078, 36 P.3d 323 (2001).

In determining an appropriate disability award, if a finding is made that the claimant has not made a good faith effort to find employment, the factfinder [sic] must determine an appropriate post-injury wage based on all the evidence before it. This can include expert testimony concerning the capacity to earn wages.<sup>6</sup>

In the March 5, 2004 Award, the ALJ specifically found respondent had additional work available which claimant could have worked. Therefore, claimant's post-injury average weekly wage was found to be \$418 based on her capacity to earn wages. This wage was likewise imputed to claimant following her termination because claimant was terminated for excessive absences which were not necessitated by her injuries as claimant argues and were not in good faith. Thus, claimant's absences were tantamount to a refusal to work under *Foulk* and demonstrated a lack of good faith under *Copeland*. As this imputed post injury average weekly wage exceeds 90 percent of her preinjury average weekly wage, no work disability is allowed.

Finally, claimant should not be allowed to receive additional medical treatment from Dr. Peloquin or anyone else as claimant has failed to prove that such additional treatment is reasonably necessary to cure or relieve the effects of her work-related injuries.<sup>7</sup>

Even claimant's medical expert, Dr. Delgado, testified that he would not recommend hydrocodone as a continued medication for claimant. He did not say that claimant needs ongoing prescription medications due to her back or upper extremity injuries. In fact, Dr. Delgado said the use of such heavy narcotic medications would put claimant at greater risk for a new or additional injury. Claimant received appropriate medical care and was ultimately released. Claimant has not established she should be awarded ongoing medical treatment from an authorized health care provider. If a need develops in the future she first must request permission from respondent or pursue an application for additional medical treatment with the Division of Workers Compensation.

**WHEREFORE**, the Board affirms the March 5, 2004 Award Post Award Medical and Review and Modification entered by Administrative Law Judge Bruce D. Benedict.

**IT IS SO ORDERED.**

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<sup>6</sup>*Id.* at Syl. ¶ 4.

<sup>7</sup>K.S.A. 44-510h(a).

Dated this \_\_\_\_ day of January 2005.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c:     Jeff R. Cooper, Attorney for Claimant  
       Mark E. Kolich, Attorney for Respondent  
       Bryce E. Benedict, Administrative Law Judge  
       Paula S. Greathouse, Workers Compensation Director